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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

ANITA D. BORLAWSKY
Petitioner

VS.

TOWN OF WINDHAM; MICHAEL R. DENBOW; SCOTT LOSCIUTO AND JANETTE LOSCIUTO
Respondents

CUMBERLAND, COUNTY OF AND JOACHIEM SCHNUPP
- Defendants

On Petition for Writ of Certiorari
To The First Circuit Court of Appeals

PETITON FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Fourth Amendment, the "totality of the circumstances" principle established in Illinois v. Gates, 462 U.S. 213 at 230-232 governing a police officer's investigatory obligations in reaching a probable cause determination to arrest without a warrant a person suspected of having committed an offense not in the officer's presence, requires that the officer reasonably investigate and take into account all the fundamental facts and circumstances readily available to him before making the determination that valid probable cause exists.
2. Whether under the Fourth Amendment the cumulative effect of the misconduct of a police officer in making and maintaining the arrest of a person without probable cause can constitute excessive force notwithstanding that each instance of misconduct standing alone may not rise to that level. Graham v. Connor, 490 U.S. 386, 394-396.
3. Whether under the Fourth Amendment and 42 U.S.C. § 1983, a private party can acquire state-actor status by virtue of having in bad-faith actively participated in a warrantless arrest without probable cause by a state law enforcement officer. Dennis v. Sparks, 449 U.S. 24 at 27-28.
4. Whether under the Fourth Amendment and 42 U.S.C. § 1985(3), persons who are divorced or otherwise single women parents are a protected class against conspiracies arising out of prior and existing relationships between former husbands and in-laws. Bray v. Women's Health Clinic, 506 U.S. 263.
5. Whether Federal Rules of Civil Procedure, Rule 52(b) applies to Rule 56.

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BASIS FOR SUPREME COURT JURISDICTION

The Judgment of the First Circuit Court of Appeals was entered in this action on July 6, 2001, per curiam.

The ORDER denying Petitioner's request for rehearing en banc and before the original panel was denied and entered on September 20, 2001.

The jurisdiction of the Supreme Court to review the Judgment of the First Circuit Court of Appeals derives from 28 U.S.C. §§ 1254 and 1257.

CONSTITUTIONAL PROVISIONS

4th Amendment, U.S. Constitution (Appendix, page 50)
14th Amendment, U.S. Constitution (Appendix, page 51)
42 U.S.C. § 1983 (Appendix, page 36)
42 U.S.C. § 1985(3) (Appendix, page 37)

MAINE STATE STATUTES

34-B M.R.S.A. §§ 3862 and 3863 (Appendix, pages 40-42)
17-A M.R.S.A. § 106(1) (Appendix, page 38)
17-A M.R.S.A. § 207 (Appendix, page 38)
19-A M.R.S.A. §4002(1)(A) (Appendix, page 38)
19-A M.R.S.A. §15(1)(A)(5), (5-A) (Appendix, pages 39-40)

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

The action was commenced in Maine State Superior Court, alleging violations of Petitioner's federal rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution and as prescribed by 42 U.S.C. §§ 1983 and 1985(3), together with several State common law torts and statutory civil rights violations.

The Defendants, Joachiem Schnupp and Cumberland County removed the action to U.S. District Court under the authority of 28 U.S.C. § 1441. The Complaint raising federal questions, jurisdiction of the District Court was appropriate under 28 U.S.C. § 1331.

The central allegation relating purely to the federal questions is that the Defendant Denbow arrested the Petitioner on July 30, 1997 without a warrant and without probable cause; and that Respondents Losciuto unlawfully conspired, procured and participated in the unlawful arrest and subsequent prosecution of the Petitioner.

The District Court granted summary judgment to all defendants; but Petitioner is pursing this appeal only against the Defendants Denbow, Town of Windham, Janette Losciuto and Scott Losciuto. The Order granting summary judgment was filed on September 26, 2000; but no separate document purporting to be the final judgment was entered. Treating the Order as an "order" within the meaning of Local Rule 6, Plaintiff filed the MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW on October 16, 2000. The District Court considered the motion on its merits and denied on October 19, 2000, stating that "...Rule 52 does not

apply to summary judgment..." Twenty-nine days later, on November 17, 2000, Petitioner seasonably filed her NOTICE OF APPEAL to the First Circuit Court of Appeals (28 U.S.C.A. § 1291).

FACTUAL BACKGROUND

For simplicity, the following designation will identify the Parties referenced in this Petition: Petitioner (ANITA); Respondent Scott Losciuto (SCOTT); Respondent Janette Losciuto (JANETTE); Respondent Michael Denbow (DENBOW); Respondent Town of Windham (WINDHAM); Defendant JOACHIEM SCHNUPP (SCHNUPP); Janelle Losciuto (JANELLE); and Joseph Losciuto (JOSEPH).

ANITA and SCOTT were formerly husband and wife, having been divorced in 1987. Janelle and Joseph were born of the marriage on November 11, 1983 and March 23, 1986, respectively. JANETTE is the mother of Scott and former mother-in-law of ANITA and grandmother of JANELLE and JOSEPH. Under the divorce decree, ANITA and SCOTT were given joint custody of the children but their primary residence was to be with ANITA.

In July of 1997, ANITA and JANELLE went with a group of other persons to a clogging competition in Chesapeake, Virginia. On their trip down to Virginia, and during the competition ANITA objected to the older girl's use of vulgar language relating to sex, orgasms and the use of condoms. The older girls were sixteen and seventeen years of age and Janelle was only thirteen. ANITA cautioned JANELLE about not keeping a close relationship with the older girls. JANELLE resented her mother's interference and a strain developed between them, a strain that was later aggravated on the return trip to Maine when

JANELLE, contrary to ANITA's wishes, left ANITA stranded at a service area on the New Jersey Turnpike after the van in which they were riding had broken down.

JANELLE returned to Maine on July 28 and went to JANETTE's residence in Windham, Maine. Because of ANITA's work schedule and JANELLE's desire to attend school in Windham, JANELLE was occasionally permitted "...part of the time..." to stay over at her grandmother's home - not 90% of the time as DENBOW claimed (DENBOW Deposition C, page 21, lines 1-4 and page 29, lines 1-23) and (PAT Transcript, Testimony of JANETTE at page 4, lines 19 through page 5, line 5); however, school was out for the summer and both JANELLE and JOSEPH should have been at their own home in Naples, Maine with their step-father, Michael Borlawsky. ANITA finally got back to Maine on July 30. At about 8:00 a.m. on that date she went to JANETTE's residence to distribute gifts bought in Virginia and to pick up JANELLE and JOSEPH. After a half-hour or so of pleasantries, ANITA instructed JANELLE and JOSEPH to get dressed and get in their vehicle to go home. JANELLE refused and the situation then escalated into a rebellious confrontation between ANITA and JANELLE. The exchange got around to the conduct of JANELLE and the older girls during the clogging event. ANITA told JANELLE that if she continued to associate with the older girls and other activities with their boyfriends that she would get a reputation of being a slut as one of the other mothers had suggested. At that point, JANELLE became very angry and called her mother a "fucking slut." Whereupon, with a reflex-like response, ANITA slapped JANELLE once across the side of the face. JANELLE in disbelief because her mother had never struck her before for any reason, threw herself onto the bed and went into a tantrum, screaming and hollering and kicking while in a sitting position. ANITA

struck JANELLE only once, never choking her, nor got on top of her (ANITA Deposition B, page 33, line 16 through page 41, line 18; and page 166, line 2 through page 176, line 12) and (JOSEPH Affidavit, Appendix, pages 45-47). JANETTE claimed that without provocation, ANITA struck JANELLE in the face and head with her hands and fists several times.

At ANITA's insistence, JANELLE and JOSEPH got into the vehicle and accompanied ANITA to their other grandmother's home in Gray. After running a few errands for ANITA's mother, all three started for their home in Naples; enroute they stopped at the Dry Mills Store to purchase Italian sandwiches for lunch when they got home. The kids went in the store and ANITA remained in the vehicle.

In the interim, JANETTE called SCOTT who instructed JANETTE to call the Windham Police Department. SCOTT, in turn, called the Cumberland County Sheriff's Department. DENBOW responded to the call from JANETTE. According to DENBOW, JANETTE told him the following: while in Virginia the relationship between ANITA and JANELLE became strained and that on their return trip to Maine the van in which they were riding broke down and JANELLE ran away from ANITA and returned to Maine with other members of the group when ANITA suggested hitch-hiking back; that ANITA came to her home to pick up the children when she returned to Maine on July 30th around 8:00 a.m. and that when she arrived, everything was calm and pleasant; that when ANITA went into the bedroom a discussion developed between ANITA and JANELLE concerning JANELLE's conduct on the trip; that JANETTE then heard yelling and screaming; that JANETTE went into the bedroom and saw

ANITA on top of JANELLE in the bed hitting her in the head with her fists and hands and choking her; that JOSEPH, the younger child (age 11) was also in the bedroom; that JANETTE told him to call the police, but ANITA told JOSEPH and JANELLE to go and get in the car or else they would get something worse when they got home; that as ANITA and the children were leaving the house, ANITA told JANETTE that if JANETTE called the police or SCOTT, she would leave the state with the two kids. DENBOW also stated that JANETTE told him that the kids stayed with her 90% of the time; that two years earlier, ANITA had threatened to leave the state and send the kids back in pieces; and that ANITA had been committed to a mental hospital about ten years prior for suicidal tendencies. DENBOW's deposition testimony relating to the foregoing appears at DENBOW DEPOSITION C, pages 15-18. Denbow also called the Department of Human Services from JANETTE'S residence and reported the incident, but the intake representative did not feel the incident was serious enough to require departmental intervention (DENBOW DEPOSITION C, page 25, lines 1-24).

JANETTE at the protection from abuse hearing and in her subsequent deposition testimony either denied giving DENBOW all the information he attributed to her or that the events he says she described to him ever occurred at all. The critical contradictions are as follows:

a. Janette did not see Anita choking Janelle (CAT Transcript F, pages 106-110, Petition Addendum, page 28).
b. Janette did not see Anita on top of Janelle, but rather Anita was standing beside the bed when the alleged assault occurred (Janette Deposition E, page 27, lines 11-23, Petition Addendum, page 29).

c. Janette has no knowledge of Anita ever having said that she (Anita) would leave the state and send the kids back in little pieces (Janette Deposition E, page 74, lines 10-14, Rehearing Addendum, page 30).
d. Janette has no knowledge of Anita having assaulted Janelle or Joseph on prior occasions (PAT Transcript A, page 11, line 23 through page 12, line 18, Rehearing Addendum, pages 31-32).
e. Janette has no recollection that as Anita left with the children she (Anita) threatened to leave the state with the children if Janette called Scott or the police (Janette Deposition E, page 71, lines 18-23, Rehearing Addendum, page 33).
f. Janette called the police not to report an assault, but to inquire about her own rights and to get a restraining order against Anita to prevent Anita from returning. She did not call out of concern for the safety of the children (PAT Transcript A, page 19, lines 17-18, Rehearing Addendum, page 34; and Janette Deposition E, page 52, lines 1-13, Rehearing Addendum, page 35).

Also JANELLE in her direct testimony at the criminal assault trial failed to describe any type of striking, hitting or punching on the part of Anita (CAT Transcript F); and that in his affidavit, Joseph stated that he was present in the bedroom and didn't see Anita strike or choke Janelle at all (Affidavit of Joseph Losciuto, Appendix, pages 45-47); and that Anita also denies ever having been confined to a mental hospital (Anita Affidavit, Appendix, pages 47-50).

Back at the Dry Mills Store, after the children returned to the vehicle they started to go to Naples; however, ANITA spotted SCOTT's vehicle parked in the

driveway in front of the Dead River convenience store across the street. She sent the children into the store to look for their father. After the children didn't return in a few minutes, ANITA got out of her vehicle and headed toward the store to collect the children. At this point, SCOTT and two deputy sheriff's came out of the store. One of the officers (SCHNUPP) asked for ANITA's driver's license and whether she had a copy of her divorce decree. ANITA told the officers she didn't routinely carry the divorce decree with her, but that she and SCOTT had joint custody and the children lived with her. SCOTT confirmed that what ANITA had said concerning custody was correct. At that point ANITA began her oddessy into the twilight zone. SCHNUPP handcuffed ANITA in the back in front of the children and put her in the backseat of cruiser. ANITA asked why she was being taken into custody and SCHNUPP sarcastically replied that she shut up and she would find out when she got back to Windham. SCHNUPP did not make any investigation or inquiry into the matter to ANITA or the children despite ANITA's protests of innocence. He relied strictly upon DENBOW's recitation of the alleged events during a cellular phone call and regarded DENBOW's determination of probable cause and request to arrest ANITA as his own probable cause. DENBOW did not ask SCHNUPP to verify the events described by JANETTE before placing ANITA under arrest. All during this period, ANITA was crying and the children were "...crying their little eyes out." At approximately noon, Deputy SCHNUPP transported ANITA to the Windham Police Department and instructed SCOTT to take the children. (ANITA Deposition B, page 37, line 3 through page 45, line 22, and page 178, line 13 through page 181, line 18; SCHNUPP Deposition D, page 14, line 18 through page 28, line 3).

Upon arrival at the Windham Police Department, SCHNUPP turned ANITA over to DENBOW after removing the handcuffs. DENBOW immediately recuffed ANITA with her hands in back and then initiated the "booking" process. He was assisted by another officer on duty. During the process while sitting on a bench, ANITA collapsed unconscious on the floor. After kicking ANITA with his foot and urging her to stop faking and get off the floor, DENBOW finally called a medic. ANITA told the officers she had hypoglycemia; she was eventually given a Pepsi to drink. The medic reported normal findings other than ANITA's complaints of lightheadedness and weakness (ANITA Deposition B, page 45, line 1 through page 57, line 10; DENBOW Deposition C, page 30, line 5 through page 44, line 19).

Upon completion of his interviews with SCOTT, JANELLE and JOSEPH at approximately 1:30 p.m., DENBOW called Dr. Carl Schuler on the telephone and reported to him all the adverse information relative to ANITA's alleged criminal conduct that he had obtained during the investigation (DENBOW Deposition C, page 44, lines 10-24; page 49, lines 3-8). DENBOW personally observed no deviant or combative behavior on ANITA's part and she denied to DENBOW any thoughts or declarations to anyone that she was considering suicide or "...going to hurt herself." (DENBOW Deposition C, page 64, line 13 through page 67, line 15 and Windham Police Department Arrest Record dated July 30, 1997, paragraph 6, page 3), Appeal Addendum, page 13). Whereupon, DENBOW and Dr. Schuler agreed that DENBOW should take her to P-6 at the Maine Medical Center for psychiatric commitment (DENBOW Deposition C, page 49, lines 3-8). Without complying in any respect with 34-B M.R.S.A. §§ 3862, 3863 or his Departmental Regulations 2-12, DENBOW

transported ANITA to Maine Medical Center and there advised the triage (admitting) staff of the alleged criminal conduct and the prior alleged threats, suicide attempts and other psychiatric problems and behavior on the part of ANITA (DENBOW Deposition C, page 51, line 20 through page 53, line 19).

ANITA was admitted involuntarily to P-6, and DENBOW later that afternoon served protection from abuse papers and issued a summons for domestic violence assault (DENBOW Deposition C, page 53, lines 1-7, Addendum 38). DENBOW urged SCOTT to obtain protection from abuse papers against ANITA after SCOTT expressed concern for the welfare of the children (DENBOW Deposition C, page 57, line 21 through page 59, line 14). ANITA was confined against her will in P-6 for a period of three days, finally being released after examination by a psychiatrist who found her free of any mental problems or need of assistance.

In the initial ex-parte petition from abuse hearing July 30, 1997, the Maine District Court entered a judgment granting temporary custody of the children to SCOTT and imposed strict supervised periods of visitation for ANITA. Thereafter, on October 3, 1997, the Court entered a judgment wherein SCOTT was granted full custody of the children with limited, strict, supervised visitation granted to ANITA. In that proceeding, SCOTT did not call JANELLE and JOSEPH as witnesses. ANITA sought to call them as witnesses on her behalf, but Judge Beaudoin refused to permit their testimony, relying instead solely upon the testimony of SCOTT and JANETTE in relation to the events of July 30, 1997, the day of the alleged assault, and the nature of the relationship between SCOTT, ANITA and the children prior to that date. SCOTT presented himself and called JANETTE as a witness to the events of July 30th, both of

whom perjured themselves in relation to those events upon which the Court entered the Judgment adverse to ANITA (Maine District Court Transcript, PAT, Transcript A, page 4, line 12 through page 24, line 6; and page 110, line 25 through page 135, line 10; and COMPLAINT FOR PROTECTION FROM ABUSE; TEMPORARY ORDER FOR PROTECTION FROM ABUSE AND NOTICE OF HEARING, AND ORDER FOR PROTECTION FROM ABUSE), Exhibits 9, 10 and 5 respectively at Appeal Addendum, pages 26, 27 and 28 respectively.

The Windham Police Department has prepared and published to its officers through its procedural manual GENERAL ORDER: 2-12, effective January 24, 1996, POLICE REPONSE TO DEVIANT BEHAVIOR; and GENERAL ORDER: 2-8, effective September 1, 1995, DOMESTIC VIOLENCE.

On May 6, 1998, following a full trial on the merits before a Jury in the Cumberland County Superior Court, ANITA was found Not Guilty of the charge of assault upon JANELLE.

REASONS FOR GRANTING WRIT

On the issues relating to probable cause and excessive force under the Fourth Amendment, the decision below conflicts with the decisions of the Supreme Court, several of the other Circuits and the controlling precedent of the First Circuit as well. With respect to the issue of conspiracy on the part of the private respondents under 42 U.S.C. § 1985(3), the question is an important one requiring consideration by the Supreme Court.

With respect to the Circuit Court Judgment, the decision below is so erroneous in both substance and procedure that the supervisory power of the Supreme Court should be invoked to correct the matter.

I. UNDER THE FOURTH AMENDMENT, THE "TOTALITY-OF-THE-CIRCUMSTANCES" PRINCIPLE ESTABLISHED IN ILLINOIS V. GATES GOVERNING A POLICE OFFICER'S INVESTIGATORY OBLIGATIONS PRIOR TO REACHING A PROBABLE CAUSE DETERMINATION TO ARREST WITHOUT A WARRANT A PERSON SUSPECTED OF HAVING COMMITTED AN OFFENSE NOT IN THE OFFICER'S PRESENCE, REQUIRES THAT THE OFFICER REASONABLY INVESTIGATE AND TAKE INTO ACCOUNT ALL THE FUNDAMENTAL FACTS AND CIRCUMSTANCES OF THE PARTICULAR OFFENSE THAT ARE READILY AVAILABLE TO HIM BEFORE MAKING A DETERMINATION THAT VALID PROBABLE CAUSE EXISTS.

The Circuit Court in its decision in this matter simply adopted the reasoning of the District Court. Unfortunately, the District Court Order failed to recite the facts upon which the grant of summary judgment was based. Petitioner filed a motion for findings of fact and conclusions of law under F.R.C.P. 52; but the District Court denied the motion on the grounds that, "Rule 52 does not apply to Summary Judgment. My summary Judgment Order speaks for itself." (Appendix, pages 23-29).

Presumably, the District Court concluded that DENBOW had probable cause to arrest Petitioner and that no genuine issue as to any material fact for jury determination remained. However, Rule 52 does apply to Rule 56 and specific findings of fact and conclusions of law

relating to both probable cause and qualified immunity would have been of great value in this appellate proceeding (Domegan v. Fair, 859 F2d 1059 at 1065, 1066 (1st Cir. 1988); Roque-Rodriguez v. Lema Moya, 926 F2d 103, 105 Note 3 (1st Cir. 1991); and Frances v. Goodman, 91 F3d 5 at 8 (1st Cir. 1996). In any event, Petitioner believes that the decision reached by the District Court and adopted by the Circuit Court clearly conflicts with authoritative decisions of the U.S. Supreme Court, the First Circuit Court of Appeals and several of the other Circuit Courts.

Contrary to the arguments presented by Petitioner (then Plaintiff), the District Court took the position that a police officer is not required to investigate and consider the totality of the facts and circumstances readily available to him in making a determination of probable cause to arrest without a warrant (ORDER ON MOTIONS FOR SUMMARY JUDGMENT, Appendix, page 23 at 26, citing several cases in support of that position, none of which are authoritative here. The cited cases are readily distinguishable on either the underlying facts or legal principles. The result reached, however, conflicts with the established precedent of the U.S. Supreme Court, the First Circuit Court and several other Circuit Courts, clearly mandating that the officer must investigate and consider the "totality of the facts and circumstances" readily available to him. See Illinois v. Gates, 462 U.S. 213, 231, 235 (1983); U.S. v. Maguire, 918 F2d 254, 258 (1st Cir. 1990); U.S. v. Jorge, 865 F2d 6, 9 Note 1; Rivera v. Murphy, 979 F2d 259, 263 (1st Cir. 1992); Rodriguez v. Comas, 888 F2d 899, 902 (1st Cir. 1989) (officer could have gotten arrestee's name simply by asking others present at scene); Lewis v. Kendrick, 944 F2d 949, 952 (1st Cir. 1991) (officer failed to question witnesses at scene, made no inquiry of arrestee as to her version and failed to look for knife at scene); B.C.R. Transport Co., Inc. v. Fontaine, 727

F2d 7 at 11 (1st Cir. 1984) (officer failed to exhaust first-hand sources of information readily available to him, i.e., friend and wife of arrestee); Wagenmann v. Adams, 829 F2d 196 at 203 (1st Cir. 1987) (officer relied on second and third hand hearsay, made no effort to verify the rumors, ignored arrestee's version and failed to make simple telephone calls to clarify the conflicting facts); Sevigny v. Dicksey, 846 F2d 953, 956-958 (4th Cir. 1988) (officer failed to make inquiry of neighbors on the scene, no exigency existed, did not compare facts with essential elements of crimes charged); BeVier v. Hucal, 806 F2d 123 at 126-128 (7th Cir. 1986) (officer must consider totality of circumstances and may not close his eyes to facts that would help clarify circumstances of the arrest and must pursue all reasonable avenues of investigation); Merriman v. Walton, 856 F2d 1333 at 1335 (9th Cir. 1988) (officer must apply a "totality of the circumstances" analysis, making further inquiry beyond initial reports if necessary before making warrantless arrest); Moore v. Marketplace Restaurant, 754 F2d 1336 at 1344-1347 (7th Cir. 1985) (per se effect of "citizen informant rule" does not control, but officer must conduct reasonable inquiry into all the circumstances); Clipper v. Takoma Park, 876 F2d 17 at 19-21 (4th Cir. 1989) (officer failed to investigate leads given by arrestee and failed to interview witnesses and check surveillance film, all of which was readily available to him); Lusby v. T.G.Y. Stores, Inc., 749 F2d 1423 at 1429-1430 (10th Cir. 1984) (officer failed to make investigation of shoplifting charge, ignored protestations of arrestees and relied strictly on a citizen's word); Smith v. Brookshire Brothers, Inc., 519 F2d 93 at 94-96 (5th Cir. 1975) (officer did not conduct independent examination before arrest). See also in principle: Calamia v. City of New York, 879 F2d 1025 at 1032 (2nd Cir., 1989); Morrison v. U.S., 491 F2d at 346 (8th Cir., 1983); U.S. v. Masini, 358 F2d 100 (6th Cir., 1966); and Adams v. Williams, 407 U.S. 143 (1972).

Applying the foregoing principles to the instant case, it is clear that DENBOW should have conducted further investigation before arresting ANITA. Had he inquired of those persons readily available to him, Anita, Janelle [the alleged victim], and Joseph [an eye witness], he would have discovered that practically none of the information he obtained from Janette was trustworthy for purposes of a probable cause determination to arrest Anita for domestic violence assault against Janelle. He would have heard overwhelming denials and a reasonable explanation of the incident coming from Anita; he would have heard from Janelle that nothing other than that Anita's explanation of the event was the true account; he would have heard from Joseph that Anita did not curse, punch or hit Janelle (Joseph Affidavit, Appendix, pages 45-47); he would have discovered that the children were not in danger or threat of continued assaults; and he could have seen that Janelle had no bruises or tell-tale marks of injury, but only red eyes from prolonged crying during the entire episode, including the arrest and handcuffing of her mother. At that point, any reasonably prudent and cautious officer would have realized he was dealing with an ambiguous family situation and not have made a warrantless arrest. State v. Wilder, 748 A.2d 444 at 456.

DENBOW was charged with the presumptive knowledge of the force and effect of the parental privilege prescribed by 17-A M.R.S.A. 106(1) (Appendix, page 38) and the exclusionary effect of 19-A M.R.S.A. 4002(1)(A) (Appendix, page 39) from the domestic abuse statute (Hall v. Ochs, 817 F2d 924 (1st Cir. 1989) (police officer expected to know the law under which he operates and seeks to enforce). Consequently, DENBOW should have realized

that Petitioner had a perfect right to discipline Janelle and that she did not commit an assault.

The Panel in having adopted the reasoning of the District Court has taken a position contrary to and in conflict with the established precedent of the First Circuit Court, the Supreme Court and at least eight of the other Circuits.

II. UNDER THE FOURTH AMENDMENT THE CUMULATIVE EFFECT OF THE MISCONDUCT OF POLICE OFFICER'S IN MAKING AND MAINTAINING THE ARREST OF A PERSON, WITH OR WITHOUT PROBABLE CAUSE, CAN CONSTITUTE EXCESSIVE FORCE NOTWITHSTANDING THAT EACH INSTANCE OF MISCONDUCT STANDING ALONE WOULD NOT NECESSARILY RISE TO THAT LEVEL.

Again, the District Court cited several cases in support of its position that Petitioner failed to make out a case for excessive force in violation of the Fourth Amendment, all of which are distinguishable on the facts. In the instant case, we believe that Petitioner became a prisoner of Denbow without probable cause and her children were immediately taken from her; that she was told to shut up when she asked why she was being arrested; that she was handcuffed behind her back and thrown into a patrol car when she posed no threat of flight or harm to the officer; that she continued to be handcuffed behind her back for four hours until she was finally committed to the psychiatric ward; that she received no assistance and was ridiculed during a vomiting episode at police headquarters; that she was observed by Denbow while she performed the most intimate functions in the bathroom even though she was not combative, uncooperative or otherwise posed a risk of harm to herself or others; that she fell to the floor after passing out

and was kicked, bruised and ridiculed by Denbow; and that she was involuntarily committed to the psychiatric ward without Denbow having complied in any respect with the commitment statute (34-B M.R.S.A. 3862, 3863, Appendix, pages 40-42), which requires certification by a professional examiner before commitment; and also as required by his own department's operating procedures (General Order 2-12).

Applying the above facts to the legal principles set forth in Alexis v. MacDonald's Restaurant, 67 F3d 341 at 352-353 (1st Cir. 1995) and Graham v. Connor, 490 U.S. 386, 394, 396 (1989), the cumulative conduct of SCHNUPP and DENBOW clearly constitutes excessive force within the contemplation of the Fourth Amendment. The Decision of the Panel is contrary to and conflicts with the authoritative precedent of the First Circuit Court and the U.S. Supreme Court. At the very least, a question for the jury remained and summary judgment should not have been granted.

III. UNDER THE FOURTH AMENDMENT AND 42 U.S.C. § 1983 A PRIVATE PARTY DOES ACQUIRE STATE-ACTOR STATUS AND THEREBY BECOME LIABLE BY VIRTUE OF HAVING ACTIVELY PARTICIPATED IN BAD-FAITH IN THE WARRANTLESS ARREST WITHOUT PROBABLE CAUSE BY A STATE LAW ENFORCEMENT OFFICER.

The District Court held that no 1983 violation existed here because SCOTT and JANETTE were private parties and did not have the requisite state-actor status (ORDER ON MOTION FOR SUMMARY JUDGMENT, Appendix, pages 23 at 25). We believe this decision is contrary to the decisions of the U.S. Supreme Court and the First Circuit precedent.

SCOTT and JANETTE acquired state-actor status by virtue of having actively and in bad faith procured and participated in the arrest and prosecution of ANITA without probable cause. The decision of the Panel conflicts with the following precedent: Adickes v. Kress & Co., 398 U.S. 144 at 150-152; Shelley v. Kraemer, 334 U.S. 1 at 14-15; United States v. Price, 383 U.S. 787 at 794-795; Lugar v. Edmunson Oil Co., 457 U.S. at 937 and 941; Dennis v. Sparks, 449 U.S. 24 at 27-28; Gonzalez v. Hernandez-Arencibia, 221 F2d 45 at 49 (1st Cir. 2000); and Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F2d 252 at 258-259 (1st Cir. 1993). The bad-faith and improper motives of the Respondents would be amply demonstrated at trial on the merits.

IV. UNDER THE FOURTH AMENDMENT AND THE PROVISIONS OF 42 U.S.C. § 1985(3), PERSONS WHO ARE DIVORCED OR OTHERWISE SINGLE WOMEN PARENTS ARE A PROTECTED CLASS AGAINST CONSPIRACIES ARISING OUT OF THE PRIOR AND PRESENT RELATIONSHIPS BETWEEN FORMER HUSBANDS AND IN-LAWS.

The District Court held that Petitioner was not in a protected class and that no conspiracy existed. We believe this is in error; however, we have no precedent squarely in point. We are asking the Court to establish such precedent on this important question. A Supreme Court decision on the issue would affect millions of divorced parents.

We do have a liberty interest of which Petitioner has been deprived, i.e., the family relationship with her children (Stanley v. Illinois, 405 U.S. 645 at 651 (1971)); that she is in a protected class as a woman (Libertad v. Welch, 53 F3d 428 at 449 (1st Cir. 1995)); that her gender-based classification is inherently invidious (Novotny v. Great American Savings

and Loan, 584 F2d 1235 (3rd Cir. 1978)). We believe the class-based animus, and the conspiracy between SCOTT and JANETTE, arose out of a desire to obtain custody of the children, destroy the family relationship on the maternal side and thereby avoid paying child support. There is ample evidence upon which a jury could infer a conspiracy from the conduct of Respondents in their perjurious testimony and their having procured the arrest of Anita without probable cause; the bad-faith initiation of the protection from abuse process resulting in the loss of custody of the children demonstrates that animus quite well.

We believe the foregoing is a sound legal position notwithstanding a dearth of precedent on the precise point and is deserving of Supreme Court consideration.

V. FEDERAL RULES OF CIVIL PROCEDURE, RULE 52(B), (AVAILABILITY OF MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW) APPLIES TO RULE 56 (SUMMARY JUDGMENT).

Although not assigned by Respondent as a basis for appeal in the Circuit Court, a holding that F.R.C.P. 52(b) does apply to a Rule 56 proceeding would be of great value and guidance to both court and counsel throughout the system.

VI. THE DECISION IS SO ERRONEOUS AND WAS REACHED IN SUCH AN UNUSUAL WAY THAT THE SUPERVISORY JURISDICTION OF THE SUPREME COURT SHOULD BE INVOKED TO CORRECT THE MATTER.

At the lower court level, the District Court Judge ignored all authoritative, substantive and procedural precedents at all court levels in reaching the result in the

ORDER ON MOTIONS FOR SUMMARY JUDGMENT. The following irregularities demonstrate the error of D. Brock Hornby, United States Chief Judge, as contained in the ORDER (Appendix, pages 23-29):

1. There were no definitive findings of fact relating to probable cause set forth in the Order despite the glaring contradictions between DENBOW and JANETTE as to what actually occurred and the powerful language of State v. Wilder, supra at page 456, allowing significant parental rights to punish an errant child, even permitting temporary marks and transient pain to be inflicted.

2. Petitioner's motion for findings of fact and conclusions of law under Rule 52(b) was erroneously and promptly denied as being inapplicable to a summary judgment (Rule 56) proceeding (Domegan v. Fair, 859 F2d 1059 (1st Cir.).

3. He refused to follow existing precedent within the same District to the effect that a police officer's failure to comply with the mentally ill commitment statute (34-B M.R.S.A. §§ 3862, 3863) (Appendix, pages 40-42) is an unlawful seizure within the Fourth Amendment (Judge Carter in Maguire v. Old Orchard Beach, 783 F.Supp. 1475 at 1485 (D.C. Maine, 1992).

4. He refused to follow existing precedent within the same District holding that malice and conspiracy are "fact-driven" issues not "often" or "gracefully" disposed of by summary judgment (Judge Brody in Barber v. Guay, 910 F. Supp. 790 at 802 (D.C. Maine, 1995).

5. He refused to follow overwhelming and controlling precedent in the Supreme Court and the First Circuit Court of Appeals relating to the issues of probable cause, excessive force and conspiracy, all as hereinbefore setforth in this Petition.

6. The cases cited by the District Court in support of its position clearly were not authoritative in that the cases were readily distinguishable in principle from that advanced by the Plaintiff, as well as the extreme factual differences within the cited cases.

7. He failed to address the issue of possible municipal liability on the part of WINDHAM for callous indifference apart from the question of DENBOW's liability. It is not clear from the Order whether DENBOW's lack of liability or his immunity is based upon a finding of valid probable cause or qualified immunity. Assuming the latter, that possible eventuality should have been addressed by the District Court.

The First Circuit simply adopted the Judgment of the District Court and its reasoning, thereby approving its content. On application for rehearing, four of the five justices to whom the application was submitted *en banc* voted not to rehear, the fifth justice having recused himself for undisclosed reasons. The original panel unanimously voted (3 to 0) not to rehear. A call by counsel to the Clerk's office revealed that three of the four justices who voted not to rehear *en banc* were the same three justices who comprised the original panel. The names of the particular justices appear on the original JUDGMENT (Appendix, page 34) and the ORDER OF THE COURT denying rehearing

(Appendix, pages 35-36). Justice Kermit Lipez was the fifth member of the roster of judges in regular active service who recused himself.

The purpose of an application for rehearing *en banc* under F.R.A.P. Rules 35 and 40 is to insure that a litigant's appeal is ultimately considered by the full Circuit Court; and equally important, that the Circuit Court is thereby able to maintain uniformity among its panels, all of which are to be governed by the precedent set by the particular Circuit, other Circuits and the Supreme Court. It would seem that neither of those noble purposes were served or fulfilled in this instance.

Because the case is so overwhelmingly erroneous in light of all precedents at all levels and because of the unusual substantive and procedural methods in which it was handled, the Supreme Court should grant certiorari and correct the matter.

CONCLUSION

There are numerous other points of law and factual matters not included in this Petition due to the page limitations. However, all matters will be presented by Petitioner at a jury trial on the merits.

Respectfully submitted,

DATED: December 14, 2001

Grover G. Alexander
Attorney for Petitioner
Supreme Court
Bar No. 50799

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY,
PLAINTIFF

Civil No. 99-272-P-H

V.

TOWN OF WINDHAM, ET AL.,
DEFENDANTS

ORDER ON MOTION FOR SUMMARY JUDGMENT

This dispute arises out of a confrontation between a mother and her teenage daughter. Foul names were exchanged, the mother struck the daughter and made a threat of some sort (the manner and the nature of both the physical contact and the threat are disputed). The episode, or parts of it, occurred in the presence of another child and the grandmother, the divorced husband's mother. As a result, the grandmother called the father/divorced husband and, on his advice, proceeded to call law enforcement authorities. The father/divorced husband also called law enforcement authorities. Ultimately the mother was arrested and charged with domestic violence assault. She was acquitted. The father/divorced husband sought a protection from abuse hearing on behalf of the children and, as a result, the plaintiff lost custody of the two children to her divorced husband. Subsequently and in an obvious effort to vindicate herself, she brought this lawsuit for damages in state court against the divorced husband, the grandmother, law enforcement officers and their employers. The defendants removed it to federal court. The remaining defendants have moved for summary judgment.

It should be apparent from this brief description that no one will ever know finally who was right or wrong or, more likely, to what degree they were right or wrong in this unfortunate family dispute. There have already been two trials in state court growing out of the episode. Neither the plaintiff nor the defendants are ever going to have complete satisfaction; that is not the nature of these kinds of disputes, and because children are involved, the wounds here will not heal quickly, if ever. The plaintiff has a long list of claims against the defendants; most of them are state claims, and at least one of them involves interpretation of a "unique" state statute that I have already referred to as worthy of certification to the Maine Law Court. As a federal judge, I address only the narrower federal claims and conclude that the defendants are entitled to summary judgment on all of them. Judgment shall, be entered accordingly and the remaining state claims will be remanded to state court. 28 U.S.C.A. § 1367(c) (West 1993). This outcome is particularly appropriate here where one of the state law claims (civil perjury) raises unique and difficult issues of state law. See Order, Dec. 22, 1999, at 4 (order denying motion to dismiss).

DIVORCED HUSBAND/FATHER AND GRANDMOTHER

The only explicit federal claim against Scott Losciuto, the children's father, and against Janet Losciuto, the children's grandmother, is a claim under 42 USC.A. § 1985(3), the civil rights conspiracy statute. Coverage of that statute, however, is limited to conspiracies based upon racial or some other class-based invidious discrimination. See Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996). There is no evidence of any such conspiracy here. The class for which the plaintiff claims protection is "divorced or otherwise single women parents." Pl.'s Mem. in Opp'n to Def. Scott Losciuto's Reply Mem. at 6. That is not a

recognized class[1]. To the extent that the plaintiff is stating a separate claim against Scott or Janet Loscuito under 42 U.S.C.A. § 1983 (the Complaint is unclear), it fails for lack of state action on the part of Scott or Janet Losciuto, who are private parties. See Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 49 (1st Cir. 2000).

TOWN OF WINDHAM AND POLICE OFFICER DENBOW

There are two federal claims against the Windham defendants. The primary one is that there was no probable cause for the arrest initiated by Officer Denbow. But the plaintiff does not contend that the witness statements Officer Denbow had received, if believable, failed to provide probable cause; the plaintiff's argument is that officer

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[1] Moreover, the only motivation disclosed by the summary judgment record is personal dislike. The plaintiff admitted the following factual assertion by Scott Loscuito:

> [The Plaintiff identified her allegations concerning Scott Loscuito's motivation for his actions: "Since our divorce in 1997, Scott has always wanted to 'get even' with me for having him arrested for assaulting me. He always[sic] felt that I give him a hard time about child support. He was always behind in his payments. He has always been motivated by revenge and a wish to avoid paying child support. I took him to Court on this issue as well. Scott does not like me and I believe he is still fighting the battles which occurred during our marriage." See [Pl.'s Ans. to Interrogs. Propounded by Def. Scott Loscuito at 126]; see also Pla.'s Opposing SMF at ¶ 51.

Reply Statement of Material Facts ¶ 4. For the admission, see Pt.'s Statement of Material Facts in Opp'n to Def. Scott Losciuto's Reply Statement of Material Facts ¶ 4. The plaintiff goes on to say that Scott Losciuto's motivation is "further explained in the Anita Borlawsky Affidavit" at paragraphs six and seven. See id. Neither paragraph suggests a class-based motivation for Scott Losciuto and Janette Losciuto's actions.

Denbow should not have believed them and should have done more investigation to test the credibility of these witness statements. I find no support for that proposition. See, e.g., United States v. Bonilla Romero, 836 F.2d 39, 46 (1st Cir. 1988) (noting that probable cause does not require police officers to investigate every possibility of innocence and doing so burdens public safety); Kelley v. Myler, 149 F.3d 641, 646-47 (7th Cir. 1998) (holding that once probable cause is established, officer is not required to investigate further); Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 128 (2d Cir. 1997) (holding that police officer is not required to explore and eliminate all theoretically plausible claims of innocence); Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th.Cir. 1996) (noting that officers are not required to conduct mini-trials before arrest). On probable cause determinations, courts do not second-guess the credibility determinations of law enforcement officers on the scene. See Baker v. McCollan, 443 U.S. 137, 145 (1979); White v. Town of Marblehead, 999 F. Supp. 345, 350 (D. Mass. 1997). This especially holds true for officers investigating complaints of domestic violence. See White, 989 F. Supp. at 350 (noting that after determining probable cause, the law has recognized the need for "urgent and decisive action," particularly in situations of domestic violence).

The second federal claim, excessive force and substantive due process, is barely pressed. The Plaintiff's entire argument on that topic is the following:

> Assuming, arguendo, that the arrest was based upon probable cause, ANITA still maintains that the force used to effect and maintain the arrest was excessive, and that DENBOWS conduct in kicking her, watching her go to the bathroom, keeping her in cuffs behind her back, and his failure

> to comply with the statutory procedure for the handling of and transporting of persons to a mental hospital, 34-B M.R.S.A. 3862, 3663, as well as the applicable General Order 2-12 setting forth his department's operating procedure for handling deviant behavior is a substantive due process violation. DENBOW claims to have ultimately regarded ANITA as a person exhibiting deviant behavior and acted accordingly.

Pl.'s Resp. to Defs. Windham and Denbow Mot. for Summ. J. at 8. The plaintiff's summary treatment of this argument justifies equally summary treatment by the court. The plaintiff's evidentiary support for these allegations reveals that the monitoring of her bathroom activities occurred in the psychiatric ward of the hospital where she had been involuntarily admitted after a medical advisor advised Officer Denbow to take her there for examination. Borlawsky Dep. at 57-59, 185. The alleged "kicking" occurred earlier at the police station, when she says that she passed out from low blood sugar and fell from a bench to the floor:

> And I was on the floor and my hands were still handcuffed behind my back and Officer Denbow said - he started kicking me on my outer left thigh from my knee to my hip. He was kicking me and telling me to get up off that floor, stop your faking, you know, stop the dramatics, you know.
> Q. When you say he was kicking you, what do you mean, how was he kicking you?
> A. You want me to demonstrate?
> Q. Well, I mean was he like winding up and kicking you or was he just nudging you with his foot?
> A. No, he was kicking me, you know, kicking me.
> Q. And was this while you were unconscious?

A. Yes.
Q. How did you know he was kicking you if you were unconscious?
A. Well, because I was coming in and out and I could feel it. I could feel every time he kicked me.

Borlawsky Dep. at 51-2.

I assume that observing intimate activity of an arrestee without justification can sometimes be a Fourth Amendment violation, but the plaintiff's evidence simply does not make that case here under the circumstances of involuntary admission to a psychiatric ward on a doctor's advice with concern for the plaintiff's risk to herself or others. See Cookout v. Powell, 945 F.2d 441, 447 (1st Cir. 1990) (noting that inadvertent, occasional, casual and restricted observation of inmate's body by an officer of opposite sex does not violate the Fourth Amendment and emergency circumstances, like harm to oneself, allows more direct observation); Ellis v. Meade, 887 F. Supp. 324, 332 (D. Me. 1995) (holding that officer's view of plaintiff's shower, in light of his suicide watch, did not violate the Fourth Amendment). Likewise, kicking an arrestee can amount to unconstitutional use of excessive force, but the encounter the plaintiff describes in her deposition, while perhaps unprofessional as she describes it, does not meet the constitutional standard to make out a substantive due process violation. See Ellis, 887 F. Supp. at 329 (holding that officer's patting pretrial detainee on the buttocks does not rise to the level of punishment to constitute a constitutional violation). Because the incident was isolated and in an effort to get the plaintiff off the floor of the police station, see Borlawsky Dep. at 51-52, the kicking was not so arbitrary or purposeless so as to lead to an inference of an intent to punish the plaintiff. See Ellis 887 F. Supp. at 1329. The use

of handcuffs for an arrestee is obviously justifiable, see Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997); Foster v. Metropolitan Airports Comm'n, 914 F.2d 1076, 1082 (8th Cir. 1990) and any failure to comply with a state statute or a police department order does not make out a constitutional violation. See Bell v. Wolfish, 441 U.S. 520, 543 (1979) (noting that draft recommendation of Federal Corrections regarding conditions of confinement are not determinative of requirements of the Constitution); Soares v. Connecticut, 8 F.3d. 917, 922 (2d Cir. 1993) (holding that Department of Environmental Protection handcuffing policy has no bearing on whether officers violated constitutional rights).

Accordingly summary judgment shall be entered for the remaining defendants on all the plaintiff's federal claims and the remaining state claims are REMANDED to state court.

SO ORDERED.

Dated this 26th day of September, 2000.

/s/ D. Brock Hornby
United States Chief District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLWASKY, Plaintiff
vs. Civil No. 99-272-P-H
TOWN OF WINDHAM, ET ALS, Defendants

MOTION FOR FINDINGS OF FACT AND
CONCLUSIONS OF LAW

NOW comes the Plaintiff pursuant to Rule 52 and moves the Court to make the findings of fact and conclusions of law upon which the ORDER ON MOTIONS FOR SUMMARY JUDGMENT dated and entered in this action on September 26th, 2000 is founded. In addition to the content of the ORDER the Court is requested to particularly setforth its findings relating to the following:

(1) The specific factual basis upon which Defendant Michael Denbow had made a determination of probable cause at the moment he ordered Deputy Sheriff Jaochim Schnupp to arrest the Plaintiff at the Dry Mills Store in Gray on July 30th, 1997.

(2) Whether or not Deputy Schnupp, Officer Denbow or any other law enforcement officers on their behalf, prior to Plaintiff's arrest, interviewed the alleged victim, Janelle Losciuto, age 13 years, the Plaintiff, the only other witness, Joseph Losciuto, age 9 years, or make any other investigative inquiry into the events alleged to have occurred at the Losciuto residence during which Defendant Janette Losciuto claims the Plaintiff viciously assaulted Janelle Losciuto.

(3) The alleged assault occurred at approximately nine o'clock in the morning on July 30, 1997 at the residence of Defendant Janette Losciuto in Windham, Maine; and the detention and arrest of the Plaintiff occurred at the Dry Mills Store in Gray, Maine at approximately noon on the same date in the presence of Deputy Sheriff Joachim Schnupp, Scott Losciuto, Janelle Losciuto and Joseph Losciuto.

(4) Following the alleged assault, Plaintiff and the alleged victim, Janelle Losciuto, and her brother, Joseph Losciuto, left the residence of Janette Losciuto together at approximately nine o'clock in the morning and traveled to Gray and other locations, ultimately stopping at the Dry Mills Store at noon-time to purchase Italian sandwiches to have for their lunch upon their return to their home in Naples, Maine.

(5) Defendant Janette Losciuto called the Windham Police Department approximately two and a half hours after the alleged assault occurred to find out what her rights were in the matter . . . not to report the alleged assault out of fear for the safety of the children.

(6) Defendants Scott Losciuto and Janette Losciuto are the former husband and former mother-in-law of the Plaintiff.

(7) The Defendants, Denbow and Town of Windham, are presumptively charged with knowledge of the force and effect of Title 17-A M.R.S.A. Section 106 and Title 19-A M.R.S.A. 4002, 1-A, wherein the act of a parent in imposing reasonable discipline upon a child for misconduct is excluded from the crime of assault.

(8) The Opinion in State vs. Wilder, 748 A2nd 444, sets forth the law relating to the right and permissible conduct of a parent under Title 17-A M.R.S.A. Section 106 to administer reasonable discipline to a child as the law has existed in Maine for several years prior to July 30th, 1997.

(9) The knowledge and information comprising the factual basis for Officer Denbow's determination of probable cause to arrest the Plaintiff for domestic violence assault came solely from the Defendants Scott Losciuto and Janette Losciuto.

(10) The arrest of the Plaintiff by Defendant Denbow was procured by the Defendants Scott Losciuto and Janette Losciuto.

(11) Defendant Denbow failed to comply with Title 34-B M.R.S-A. Sections 3862, 3863, relating to involuntary commitment to mental hospitals.

(12) Defendant Denbow failed to comply with the enforcement directives of the Windham Police Department relating to the investigative requirements to determine probable cause (General Order 2-8), and the commitment requirements of Title 34-B-M.R.S.A.3862-3863 (General Order 2-12) relating to insane persons and deviant behavior.

DATED: October 16th, 2000 /s/ Grover G. Alexander
Attorney for Plaintiff

Office of the Clerk
United States District Court
DISTRICT OF MAINE

William S. Brownell
Clerk

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October 19, 2000

TO: Grover G. Alexander, Esq.
John J. Wall, Esq.
Mark G. Lavoie, Esq.
Barri L. Bloom, Esq.

RE: Anita D. Borlawsky v. Town of Windham, et al.
CIVIL NO. 99-272-P-H

Dear Counsel:

Please be advised that the following endorsement was made on the Plaintiff's Motion for Findings of Fact and Conclusions of Law.

"10/19/01 - Denied. Rule 52 does not apply to Summary Judgment. My Summary Judgment Order speaks for itself. /s/ D. Brock Hornby, U.S.D.J."

Very truly yours,
WILLIAM S. BROWNELL, CLERK
By: /s/ Melody Montanese, Case Manager

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2529
ANITA D. BORLAWSKY
Plaintiff-Appellant

VS.

TOWN OF WINDHAM; MICHAEL R. DENBOW;
SCOTT LOSCIUTO AND JANETTE LOSCIUTO
Defendants-Appellees

CUMBERLAND, COUNTY OF; JOACHIEM SCHNUPP
Defendants

Before
Torruella, Circuit Judge,
Selya and Lynch Circuit Judges

JUDGMENT
ENTERED: July 6, 2001

Per curiam. This panel affirms the holding of the district court, based on the reasoning therein. See Borlawsky v. Town of Windham, 115 F. Supp. 2d 27 (D. Mass. 2000) (Order on Motion for Summary of Judgment).

By The Court:
Janice O'Neil, Acting Clerk
By: /s/ Julie Gregg, Appeals Attorney

(cc: Grover G. Alexander, John J. Wall, Aaron K. Baltes and Barri L. Bloom)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANITA D. BORLAWSKY No. 00-2529
Plaintiff-Appellant

VS.

TOWN OF WINDHAM; MICHAEL R. DENBOW;
SCOTT LOSCIUTO AND JANETTE LOSCIUTO
Defendants-Appellees

CUMBERLAND, COUNTY OF; JOACHIEM SCHNUPP
Defendants

ORDER OF THE COURT

Before
BOUDIN, Chief Judge,
TORRUELLA, SELYA and LYNCH, Senior Judges

September 20, 2001

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing *en banc* having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals may be heard or reheard by the Court *en banc*,

It is ordered that the petition for rehearing and the suggestion for rehearing *en banc*, be denied.

By The Court:
/s/ Janice O'Neil, Acting Clerk

cc: Grover G. Alexander, Esq.
John J. Wall, Esq.
Aaron K. Baltes, Esq.
Barri L. Bloom, Esq.

---

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. § 1979; Pub. 7. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

§ 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived or having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980).

§ 207. Assault

1. A person is guilt of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.

2. Assault is a Class D crime.

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§ 106. Physical force by persons with special responsibilities

1. A parent, foster parent, guardian or other similar person responsible for the long term general care and welfare of a person is justified in using a reasonable degree of force against such person when and to the extent that he reasonably believes it necessary to prevent or punish such person's misconduct. A person to whom such parent, foster parent, guardian or other responsible person has expressly delegated permission to so prevent or punish misconduct is similarly justified in using a reasonable degree of force.

§ 4002. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Abuse. "Abuse" means the occurrence of the following acts between family or household members or by a family or household member upon a minor child of a family or household member:

A. Attempting to cause or causing bodily injury or offensive physical contact, including sexual assaults under Title 17-A, Chapter 11, except that contact as described in Title 17-A, section 106, subsection 1 is excluded from this definition;

---

§ 15. Warrantless arrests by a law enforcement officer

1. Except as otherwise specifically provided, a law enforcement officer may arrest without a warrant.

A. Any person who the officer has probable cause to believe has committed or is committing:

(1) Murder;

(2) Any Class C, Class B or Class C crime;

(3) Assault while hunting;

(4) Any offense defined in Chapter 45;

(5) Assault, criminal threatening, terrorizing or stalking, if the officer reasonably believes that the person may cause injury to others unless immediately arrested;

(5-A) Assault or reckless conduct if the officer reasonably believes that the person and the victim are family or household members, as defined in Title 15, section 321;

(6) Theft as defined in section 357, when the value of the services is $2,000 or less if the officer reasonably believes that the person will not be apprehended unless immediately arrested;

(7) Forgery, if the officer reasonably believes that the person will not be apprehended unless immediately arrested;

(8) Negotiating a worthless instrument if the officer reasonably believes that the person will not be apprehended unless immediately arrested;

MENTAL HEALTH 34-B § 3862
Ch. 3

§ 3862. Protective custody

1. Law enforcement officer's power. If a law enforcement officer has reasonable grounds to believe, based upon his personal observation, that a person may be mentally ill and

that due to his condition he presents a threat of imminent and substantial physical harm to himself or to other persons, he:

A. May take the person into protective custody; and

B. If the officer does take the person into protective custody, shall deliver the person forthwith for examination by an available licensed physician or licensed clinical psychologist, as provided in section 3863.

2. Certificate not executed. If a certificate relating to the person's likelihood of serious harm is not executed by the examiner under section 3863, the officer shall:

A. Release the person from protective custody and, with his permission, return him forthwith to his place of residence, if within the territorial jurisdiction of the officer;

B. Release the person from protective custody and, with his permission, return him forthwith to the place where he was taken into protective custody; or

C. If the person is also under arrest for a violation of law, retain him in custody until he is released in accordance with the law.

3. Certificate executed. If the certificate is executed by the examiner under section 3863, the officer shall undertake forthwith to secure the endorsement of a judicial officer under section 3863 and may detain the person for a reasonable period of time, not to exceed 18 hours, pending that endorsement.

4. Transportation costs. The costs of transportation under this section shall be paid in the manner provided under section 3863.

1983, c. 459, § 7, eff. Jan. 15, 1984. Library References Mental health 36. C.J.S. Insane Persons § 64.

§ 3863. Emergency procedure.

A person may be admitted to a mental hospital on an emergency basis according to the following procedures.

1. Application. Any health officer, law enforcement officer or other person may make a written application to admit a person to a mental hospital, subject to the prohibitions and penalties of section 3805, stating:

A. His belief that the person is mentally ill and, because of his illness, poses a likelihood of serious harm; and

B. The grounds for this belief.

2. Certifying examination. The written application shall be accompanied by a dated certificate, signed by a licensed physician or a licensed clinical psychologist, stating:

A. He has examined the person on the date of the certificate, which date may not be more than 3 days before the date of admission to the hospital; and

B. He is of the opinion that the person is mentally ill and, because of his illness, poses a likelihood of serious harm.

UNITED STATE DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY, Plaintiff
vs. Civil No. 99-272-P-H
TOWN OF WINDHAM, at als, Defendants

AFFIDAVIT OF MICHAEL BORLAWSKY

I, Michael Borlawsky, having first been duly sworn, do depose and say, that I have personal knowledge of the facts and events hereinafter enumerated.

I live in Naples, Maine with my wife, Anita D. Borlawsky. I am thirty-five years of age, and I am the stepfather to Joseph Losciuto and Janelle Losciuto. Joseph is living with his mother and me in Naples. I believe Janelle presently lives with her father in Windham.

I am aware of the incident at the Losciuto, home on July 30, 1997; but I have no personal knowledge of the events that actually took place there.

I do know that on one occasion when I went to the Janette Losciuto home to either drop-off or pickup the children, which I did from time to time in order to accommodate Anita and Janette, I had a conversation with Janette relating to the arrears in child support that Scott Losciuto owed to Anita and over which Anita had taken Scott back to Court. I believe Janelle had just turned twelve and Anita wanted to collect the arrears and also get an increase in the support if possible. At that time Janette was saying that Anita was being unfair to Scott and that as a result Scott never had any

money for himself. I specifically recall that Janette said that she and Scott were going to do all they could to get full custody of the kids and then Scott would never have to pay Anita all that money for child support again. I told Anita about this conversation.

Because of my status as the kid's step-father, I always tried to get along with the Losciutos; and I was always very patient with Janette when she would complain and criticize Anita to me about how Scott was being treated over the child support issue. Janette always had too much to say unfavorably about people, particularly Anita. She would invite me to have coffee with her and then she would gripe about everything in her life. If it wasn't about Anita, it would be about somebody else she didn't like.

DATED at Gray, Maine this 4th day of August, A.D. 2000.

/s/ Michael Borlawsky

STATE OF MAINE
CUMBERLAND, SS. August 4th, 2000

THEN personally appeared the above named MICHAEL BORLAWSKY and took oath, upon personal knowledge, to the truth of the foregoing events, before me,

/s/ Grover G. Alexander
Attorney at Law

Name Printed: GROVER G. ALEXANDER

UNITED STATE DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY, Plaintiff
vs. Civil No. 99-272-P-H
TOWN OF WINDHAM, at als, Defendants

AFFIDAVIT OF JOSEPH LOSCIUTO

I, JOSEPH LOSCIUTO, having first been duly sworn, do depose and say as follows,

My name is Joseph Losciuto and I am 14 years old. I live in Naples, Maine with my mother, Anita D. Borlawsky, and my stepfather, Michael Borlawsky. My real father's name is Scott Losciuto. My sister's name is Janelle Losciuto and she lives with my father in Windham, Maine. I was just 11 years old at the time of the problem between my mother and Janelle at my grandmother's house. Janelle was almost 14 years old.

On that day I know my mother came to pick us up. My mother talked to my grandmother and grandfather in the kitchen. My cousin Sean and me went downstairs to play games. The bedroom where Janelle was is upstairs. In a little while I heard Janelle and my mom screaming at each other in the bedroom. I ran upstairs to see what was going on. My mom was right in Janelle's face telling her to get ready to go. Janelle then started crying and screaming to my grandmother that she didn't want to go. Then my grandmother came running in and stood between Janelle and my mom. My mom pushed Grammy out of the way. Janelle always cries and carries on when she doesn't get her own way. She is very spoiled...even more than me. Grammy told me to call 911 and I left the bedroom. My mom followed

me and told me to get in the car immediately, and I did. My mom never threatened us at all. Me and mom and Janelle left right after and went over to my other Grammy's house in Gray. I thought everything was okay. I didn't see or hear my mom choke or hit Janelle or curse her at any time.
After the cops handcuffed my mom and took her away at the store in Gray, my father took Janelle and me back to Grammy's house in Windham. I was really nervous, and me and Janelle were crying real hard. At the house we talked about what happened. I really became confused because of what Janelle, my father and Grammy were saying about what happened. My father took us to the police station. The policeman told me to write out what had happened, but I told him I was too nervous. My father wrote out the paper and told me to sign the paper, and I did. I was so upset that I agreed with everything my father and the cop said about my mother even though I knew it wasn't true. Afterward, I was influenced by Janelle, my father and grandmother to go and live with my father and grandmother. Janelle wanted to live with them so she could do what she wanted to at school and with the other girls in the Hoedowners. At first, I went along with everything they said . . . even our guardian, Tina Smith.

My father also told me what to say at the trial against my mom. I was really confused and scared there, too. I regret all of that now that I am older and understand things better. My mom has never struck or hit me or Janelle, although there were times we probably deserved it.

DATED at Gray, Maine this 3rd day of August, A.D. 2000.

/s/ Joseph Losciuto

STATE OF MAINE
CUMBERLAND, SS. August 3rd, 2000

THEN personally appeared the above named JOSEPH LOSCIUTO and took oath, upon personal knowledge, to the truth of the foregoing events, before me,

/s/ Meredith E. Davis
Notary Public or Justice of the Peace
[SEAL]
Name Printed: Meredith E. Davis, Notary Public
State of Maine, My Commission Expires on 6/9/2003

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY, Plaintiff
vs. Civil No. 99-272-P-H

TOWN OF WINDHAM, et als, Defendants

AFFIDAVIT OF ANITA D. BORLAWSKY

I, ANITA D. BORLAWSKY, of Naples in the County of Cumberland and the State of Maine, having first been duly sworn, do depose and say as follows:

I am the Plaintiff in the above entitled matter, and I have personal knowledge of the facts and events hereinafter setforth.

I am 35 years of age and I reside in Naples, Maine with my husband, Michael Borlawsky, and my son Joseph. Joseph Is 14 years of age; I have a daughter, Janelle, who lives with her father, Scott Losciuto, In Windham, Maine; Janelle is 16 years of age. My former mother-in-law is Janette Losciuto and she also lives in Windham, Maine about a hundred yards from Scott. I was married to her son, Scott; and he is the biological father of Janelle and Joseph.

I wish to either specifically deny or explain the following:

1) That I ever attempted suicide. On that occasion in 1989 or 1990, and at the suggestion of Dr. Schuler, I voluntarily went to Portsmouth Pavilion in the aftermath of having taken too many of the prescribed painkillers that I had been taking for a number of years because of a severe back condition. I knew that there was no danger of death and I simply on my own took too many of the pills because the pain in my back was excruciating and I couldn't seem to get relief by taking the proper amount. Claiming to want to help me, Janette drove me to Portsmouth and then turned around and told everybody that I had been sent to a mental institution because I tried to commit suicide.
2) That I ever tried to smother or otherwise press a pillow over Janelle's face on July 30th, 1997. At one time during that rebellious encounter, I believe Janelle had her little half-sister, Julia, in her arms or lap; and I know I certainly didn't do anything to Julia either.
3) That the admission history at P-6 came mostly from Sgt. Denbow, and most of that information is incorrect in practically every respect. I do not have a schizophrenic sister and I did not kidnap my kids as the Note recites. I am a nurse and I know how frequently the triage staff

receives incorrect information from all sorts of sources or simply gets things wrong themselves in the rush of emergency room practice,

4) I was committed to P-6 at MMC against my will. I was discharged at my insistence after three-plus days. I was found to be as normal as anyone else on the streets. I received no psychiatric care, nor was any ordered, after my release.

5) I deny that the events involving hitchhiking in trucks, threats and name calling to Janelle as described by Alice Bryant and Kirsten Gustofsen in the course of the protection from abuse hearing ever occurred.

6) Scott and Janette - - mostly Janette - - always complained about Scott having to pay child support and that he was poor and that he had no money for himself and his new family. They said he had to live under such bad conditions as he did because he had to pay so much child support and that I always wanted more. I never asked for more than what the Court ordered and the amount called for by the guidelines. Attached is a photograph of the house foundation he lived in before he got full custody of the children, and also the new house he built afterward when he no longer had to pay me $107.00 per week, and I had to pay him $56.00 per week in addition, after he obtained full custody on October 7th, 19[illegible]

7) Scott always said he would get even with [illegible] for having him arrested for assaulting me during our marriage and "hounding" him for child support. I believe that expressed intention, coupled with his wish to be entirely free of child support payments, explains why he and Janette have lied and done all this to me and influenced Janelle against me. His life style changed greatly to the good after he obtained custody.

DATED at Gray, Maine this 3rd day of August, A.D. 2000.

/s/ Anita D. Borlawsky

STATE OF MAINE
CUMBERLAND, SS. August 3rd, 2000

THEN personally appeared the above named ANITA D. BORLAWSKY and took oath, upon personal knowledge, to the truth of the foregoing events, before me,

/s/ Meredith E. Davis
Notary Public or Justice of the Peace
[SEAL]

Name Printed: Meredith E. Davis, Notary Public
State of Maine, My Commission Expires on 6/9/2003

AMENDMENT IV – SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.